U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 June 2003

BALCA Case No.: 2002-INA-135
ETA Case No.: P1998-CA-09427990/ML

In the Matter of:

EMMANUEL HEALTH CARE CENTER,
Employer,

on behalf of

ELVIRA SANTIANO,
Alien.

Appearance: Jack Golan, Esquire
Los Angeles, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Elvira Santiano ("Alien") filed by Emmanuel Health Care Center ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Atorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. 20 C.F.R. § 656.20.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 14, 1997, Employer, Emmanuel Health Care Center, filed an application for labor certification to enable the Alien, Elvira Santiano, to fill the position of "NURSE/Licensed Vocational," which was classified by the Job Service as "Nurse, Licensed Practical" (AF 16). The job duties for the position, as stated on the application, are as follows:

> Provide prescribed medical treatment and personal care services to residents of Skilled Nursing Facility: S/he will: Maintain acceptable standards, policies, & procedures of

> nursing practice; prepare, administer & chart medications according to the physician's order; responsible for total resident care in the assigned unit & assist with direct patient care; coordinate the work with on coming (sic) and leaving shifts; responsible for interpretation & execution of the physician's orders; make decisions in emergency situations & practice first aids (sic); provide direct nursing care to critically ill residents & administer special treatments under the direction of the Medical personnel in charge; prepare residents for & assist with diagnostic & therapeutic procedures, treatments & examinations; assist in admission process & orientation of new residents; responsible for accurate observation, evaluation & reporting of resident's symptoms, reactions & process; prepare reports & participate in resident care conferences.

(AF 16). The stated experience requirement for the position is two years in the job offered or in the related occupation of Certified Nursing Assistant. In addition, Employer set forth the following other special requirement: "Must have a California LVN License." (AF 16).

In a Notice of Findings ("NOF") issued on April 25, 2001, the CO proposed to deny certification on the grounds that Employer had made an insufficient recruitment effort, and as a result, Employer failed to document that it rejected U.S. workers for other than lawful, job-related reasons and/or that the job opportunity was clearly open to any qualified U.S. worker (AF 12-14). On or about May 29, 2001, Employer submitted its rebuttal (AF 9-11). The CO found the rebuttal unpersuasive and issued a Final Determination, dated July 25, 2001, denying certification on the above grounds (AF 7-8). On August 24, 2001, Employer filed a Motion to Reconsider (AF 2-6), which the CO denied on the grounds that the motion did not raise matters which could not have been addressed in the rebuttal (AF 1). Although the Appeal File does not contain a specific Request for Review from Employer, the CO apparently treated Employer's "Motion to Reconsider Final Determination of 07/25/2001" as a combination of a motion for reconsideration and a request for review. Accordingly, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated March 28, 2002, the "Labor Certification Appeal Brief for Employer

and Alien" was filed, clearly specifying the grounds for appeal.

DISCUSSION

Under 20 C.F.R. §656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful job-related reasons. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the statement of recruitment results, dated September 8, 1998, Employer set forth its reasons for not hiring any of eight U.S. applicants. In summary, Employer stated that it had sent timely letters inviting all eight for interviews and, in some instances, also tried reaching applicants by phone. Notwithstanding the foregoing, only one U.S. applicant, Ms. Morales, actually appeared for an interview. However, she was deemed to be unqualified. Of the remaining U.S. applicants, three (Clark, D. Garcia, G. Garcia) called Employer and reportedly stated that they were not interested in a Licensed Vocational Nurse position, but rather a Certified Nursing Assistant position. The other four U.S. applicants (Beltran, Burgos, Eschenbach, Kutra) were reportedly "unavailable" and/or "neither available nor interested," because they did not respond to Employer's efforts to contact them for an interview (AF 23-25).

In the NOF (AF 12-14), the CO cited Employer's "Insufficient Recruitment Effort" as the

basis for his proposed denial of certification. The CO stated, in pertinent part:

> Basis in Precedent: Efforts by the employer to contact an applicant more than 14 days after receipt of a resume may not be timely contact and may indicate a failure on the employer's part to recruit in good faith. The rejection of U.S. workers also would be considered as not based on valid, job-related reasons (20 C.F.R. § 656.21(b)(6)) and the job opportunity would not be considered to be clearly open to any qualified U.S. worker (656.20(c)(8)).
>
> Finding: Job Service sent resumes to you on 7 August 1998. There is insufficient evidence your effort to contact the eight qualified applicants took place. We note that the telephone number on your letter head is totally different than that given on the ETA750A.
>
> Positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills). The evidence in hand is not convincing your efforts to contact applicants took place at all, or as "early as possible" as EDD had directed. The evidence also shows you did not conduct a good-faith recruitment effort. The recruitment is considered tardy and incomplete.
>
> Corrective action: If you contend this conclusion is inaccurate, submit a rebuttal giving details of your attempt(s) to interview the U.S. applicants.

(AF 13).

Employer's rebuttal consists of a letter dated May 10, 2001, signed by Hermie Ilagan, Employer's Director, Human Resources (AF 10-11), and a cover letter by Employer's counsel dated May 29, 2001, referring to supporting documents (AF 9). The referenced documents are part of the Appeal File, and include the EDD's Assessment Notice dated November 7, 1997 and Employer's

response thereto dated December 16, 1997 (AF 87-89) and copies of Employer's invitation letters sent by certified mail, including the return receipts (AF 29,34,37,47,53, 63,66,71).

In its rebuttal letter, dated May 10, 2001 (AF 10-11), Employer stated, in pertinent part:

> The Job Service sent resumes to us on 07/07/1998 [sic].[1] You have found that there is insufficient evidence that our efforts to contact the eight qualified applicants took place. You have also noted that the TELEPHONE NUMBER ON OUR LETTERHEAD IS TOTALLY DIFFERENT FROM THAT GIVEN ON THE ETA 750A, and that the evidence on hand is not convincing our efforts to contact applicants took place at all, or "as early as possible" as EDD had directed, and that the recruitment is considered tardy and incomplete.
>
> Please note that **your conclusion is inaccurate**, due to the following: On or about 12/01/1997, my response to EDD's assessment notice dated 11/07/1997 was sent to EDD, amending the Form 750A, item #17 (Number of Employees Alien will Supervise) and item #12a & b (Basic rate of Pay & Overtime Rate of Pay). **Included in my amendments which were submitted in duplicate was a statement authorizing our Assistant Administrator, Ms. April Pearl Bernabe to do the recruitment process in this case. The telephone and fax number were also submitted where she can be contacted.** The telephone number that was provided was **(818)331-0781** & the Fax number was **(818)331-5402**. These numbers are the same numbers of Emanuel Health Care Center-Glendora facility as stated in the company letterheads. (Copies of **EDD's Assessment Notice of 11/07/1997** and my **statement in duplicate submitted to EDD before the deadline of 12/22/1997** are enclosed). Please also **note that the area code of the City of Glendora in 1997-1998 (during the recruitment process) was still (818) and now it is (626)**. Also,

[1] The Job Service actually sent the resumes to Employer on August 7, 1998 (AF 72-74), as set forth in the NOF (AF 13).

the Corporate Office's telephone number where I can be contacted has been changed from **(818)858-6200** to **(626)584-8500**, hence, kindly amend the Form ETA 750A, item #15, to reflect the Corporate Office's current phone number, (626)584-8500.

Therefore, your contention is inaccurate. Our company's recruitment efforts were done in good faith and are not in violation of 20 CFR 656.21(b)(6) and 656.20(c)(8). We have provided the name, telephone and fax numbers of Emanuel Health Care Center's Assistant Administrator at that time, before the recruitment process started. We performed all possible ways to consider all applicants for the job. All the eight applicants were contacted on time by sending each one of them a CERTIFIED INVITATION LETTER. Our letters that were sent to each applicants (sic) were mailed and scheduled within the required fourteen (14) calendar days of the referral (copies of our letters to the eight applicants with the certified mailing and returned receipts are enclosed for your reference).

We hope that your finding is fully satisfied. We are, therefore, respectfully requesting that this application for **Alien Employment Certification filed on behalf of the Alien be certified as quickly as possible.**

(AF 10-11)(Emphasis in original).

In the Final Determination, dated July 25, 2001, the CO rejected Employer's rebuttal and denied certification (AF 7-8). The CO stated, in pertinent part:

INSUFFICIENT RECRUITMENT EFFORT

NOF questioned whether you had made a good-faith effort to recruit U.S. workers: applicants were asked to contact a telephone number completely different from that on the ETA750A. You rebut that the area codes changed and that different contact people had different numbers at different times.

> The upshot is that it is likely U.S. workers who called you to set up an appointment would have called a number where no-one would help them. We also note that several of the applicants come from telephone area codes adjacent to yours, meaning calls from them would have been on your telephone bills (NOF mentioned this as possible evidence); you did not submit such evidence. You have not convincingly shown a good-faith effort to recruit qualified applicants BELTRAN, BURGOS, CLARK, ECHENACH (sic), D. GARCIA, G. GARCIA, KUTRA and MORALES.

(AF 7-8).

In its Motion to Reconsider (AF 2-6), Employer sought to further explain its rebuttal argument and address the CO's Final Determination. Employer noted that although the telephone bill at the time of recruitment (August 1998) showed a (626) area code, that the area code of (818), as listed on its letterhead was also valid, because it was a period of transition when the two area codes were both used. Accordingly, Employer stated: "Whether the applicant dialed (626) 331-0781 or (818) 331-0781, either call would reach the facility without a hitch." (AF 3). Secondly, Employer stated that there is no logic to the CO's contention that the discrepancy between the phone number on the ETA 750 A and the one on Employer's letterhead would have confused the applicants. Employer noted that the applicants would never have even seen the ETA 750 A form, as they would have simply called the number listed on the letters inviting them for interviews. Thirdly, Employer stated that, contrary to the CO's statement in the Final Determination, calls from the applicants to Employer would not have been on Employer's telephone bills, unless they were collect calls. Finally, Employer reiterated that it had made timely recruitment efforts (AF 2-4). As stated above, the CO summarily denied the motion, because it did not raise matters which could not have been addressed in the rebuttal (AF 1).

Having carefully reviewed the Appeal File, we concur with the CO's general conclusion that Employer has failed to establish a good faith effort to recruit seemingly qualified applicants. However, as discussed below, we also find that the NOF was ambiguous; that Employer made a

reasonable effort to address the deficiencies as described in the NOF and that the CO's underlying basis for finding a failure to establish good faith recruitment was misstated in the NOF and the Final Determination.

As previously noted, the Job Service sent the resumes of the eight U.S. applicants to Employer under cover letter dated August 7, 1998 (AF 72-74). On August 17, 1998, Employer mailed letters, outlining the date and time of a scheduled interview, to each of the U.S. applicants by certified mail, return receipt requested (AF 29,34,37, 47,53,63,66,71). Therefore, even if Employer received the resumes the day after they were sent by the Job Service, Employer mailed its letters to the applicants within nine days of receipt (*i.e.*, August 8, 1998-August 17, 1998). Assuming Employer made contact with the U.S. applicants, its action in sending the certified letters within nine days of receipt of the resumes would be deemed timely. However, a careful review of the return receipts reveals that among the 8 U.S. applicants, only Patrice Clark (AF 37), Donna Garcia (AF 53), and Lerma D. Morales (AF 71; *Compare signature on* AF 67) personally signed for the letters. The certified letters sent to U.S. applicants Macaria (Dolly) Beltran, (AF 29), Noelia Burgos (AF 34), Rebecca A. Eschenbach (AF 47), German Garcia (AF 63), and Barbara Kutra (AF 66) were signed by people other than the applicants. Accordingly, there is no assurance that the latter five U.S. applicants even received the certified letter.

It is well settled that a third-party communication, such as leaving a telephonic message with an applicant's spouse, is insufficient to establish that the applicant is not interested in the job, unless the employer proves that it made contact with the applicant. *See, e.g., Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988)(*en banc*). Similarly, Employer herein failed to establish actual contact with several of the U.S. applicants because they did not personally sign for the certified letter. Accordingly, Employer should have tried an alternative means of contact, such as by telephone. In the present case, Employer apparently made such an alternative attempt, as set forth in the statement of recruitment efforts. However, it is unclear when the telephone calls were made and/or whether they were timely (AF 23-25). Moreover, even assuming each of the U.S. applicants personally received Employer's letter on the dates set forth on the return receipts, at least some of the applicants

were not provided adequate time to respond thereto.

The record reveals that all the certified letters sent by Employer are dated August 17, 1998, and direct each applicant to be available for a personal interview at a specified time on August 24, 1998, as scheduled unilaterally by Employer. Moreover, the U.S. applicants were directed to bring to the interview proof of their experience and qualifications, including a valid California LVN License, and to confirm the appointment with the Assistant Administrator, Ms. April Pearl Bernabe. However, the certified letters were received by the U.S. applicants and/or signed by someone else on August 20, 1998 (AF 29), August 19, 1998 (AF 34), August 22, 1998 (AF 37), August 20, 1998 (AF 47), August 20, 1998 (AF 53), August 20, 1998 (AF 63), and August 19, 1998 (AF 71), respectively. Accordingly, the U.S. applicants were provided only two to five days to respond to Employer's contact letter. Although some of the applicants responded thereto, we find that Employer could not assume that an applicant's failure to appear for the interview and/or respond within such a short time period establishes a lack of interest and grounds for rejection. *See, e.g., Tempco Engineering, Inc.*, 1988-INA-101 (June 20, 1988); *Michael Alex*, 1990-INA-414 (Dec. 9, 1991); *Galletti Brothers Food*, 1990-INA-511 to 1990-INA-516, 1990-INA-531 to 90-INA-566 (Apr. 30, 1991). Furthermore, Employer's assertion that it subsequently attempted to contact U.S. applicants by leaving telephone messages on answering machines and/or with family members on unspecified dates (AF 23-25) is insufficient to cure this deficiency.

In summary, Employer has sought to address the "Insufficient Recruitment Effort" deficiency, as cited by the CO. As set forth in Employer's rebuttal (AF 9-11), the certified letters were promptly sent by Employer and the letters clearly provide the name and title of the contact person (*i.e.*, Assistant Administrator, Ms. April Pearl Bernabe), as well as Employer's address, telephone number, and fax number, during the recruitment period (AF 29,34,37, 47,53,63,66,71). Moreover, as argued by Employer in its Motion to Reconsider, any discrepancy between the telephone number listed on the ETA 740 A form (AF 16, Item 5) and on the certified letters would not have confused the applicants, since they would never have seen the ETA 750 A form. Similarly, the change in area code would have had no effect, because, as explained by Employer, the 818 area code was still in use

at the time of the recruitment process (AF 2-3). However, as outlined above, there are still underlying problems regarding Employer's attempts to contact the U.S. applicants, which suggest a lack of good faith. By focusing on the wrong underlying problem, the CO undermined Employer's ability to cure the deficiency. It is well settled that the NOF must specify what the employer must show to rebut or cure the CO's findings. *See, e.g., Peter Hsieh*, 1988-INA-540 (Nov. 3, 1989); *Sue Chiang*, 1989-INA-77 (May 25, 1990). Furthermore, if an unclear NOF causes or contributes to an employer's confusion, the matter may be remanded for clarification and to give the employer an opportunity to rebut. *See, e.g., Pattisserie Suisse, Inc.*, 1990-INA-131 (Oct. 16, 1991); *Dr. Joseph Maghen*, 1988-INA-335 (Aug. 8, 1989).

In the present case, we find that CO's NOF was ambiguous and did not adequately specify what Employer must show to rebut or cure the CO's findings. Furthermore, while the record may support a finding that Employer did not establish good faith recruitment, the underlying basis for that finding, as stated in the Final Determination, is not persuasive. Accordingly, we find that this matter should be remanded.

Finally, we note that the advertisement placed by Employer does not specify the requirement that a qualified applicant "must have a California LVN License." (AF 76-78; *Compare* AF 16, Item 15). The absence of this requirement on the advertisement may explain why some of the U.S. applicants sent their resumes, and subsequently stated that they were applying for a Certifying Nursing Assistant position rather than as a Licensed Vocational Nurse (AF 24). On remand, Employer is directed to engage in a completely new recruitment effort, in which the advertisement accurately reflects all of the requirements for the position.

ORDER

The denial of labor certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.